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Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

KAISER ALUMINUM & CHEMICAL CORPORATION,
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
UNITED STATES OF AMERICA and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

BRIAN F. WEBER, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICI CURIAE

AMERICAN G.I. FORUM, INCORPORATED MEXICAN AMERICAN GOVERNMENT EMPLOYEES, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, S.E.R.-JOBS FOR PROGRESS, INC.

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vs.

BRIAN F. WEBER, et al.,

Respondents.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE[1]

The American G.I. Forum is a veteran's family organization composed primarily of Mexican Americans. It had its beginnings after World War II in the aspirations of returning Mexican American veterans to end the discriminatory social, economic and political practices that pervaded this country. The organization now has chapters nationwide. One of the main goals of the Forum is the improvement of employment opportunity.

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[1] Because of the extraordinary interest in the issues presented in this case, a large number of amicus briefs have been filed. The statement of principles set forth in Appendix A. will apprise the Court of the mutual support of many amici for a number of basic positions in defense of the affirmative action program in controversy in the present case. Amici's interest in this case is magnified by recent studies revealing the government's unkept promise to protect the equal employment opportunities of hispanics. Between 1060 and 1976 the degree
(cont. next page)

The Incorporated Mexican American Government Employees (IMAGE) is a national organization concerned with the public employment of Hispanic Americans, Mexican Americans, Cuban Americans, Puerto Ricans, Central-South Americans, and all those of Hispanic cultural/linguistic heritage. With close to 70 affiliates chartered in 24 states, IMAGE is incorporated in the District of Columbia.

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1 (cont. from last page)
of occupational segregation for Mexican American males and females actually became worse. United States Commission on Civil Rights, Social Indicators of Equality for Minorities and Women (August 1978), pp. 40-46. In December, 1977 the Commission reported, "...drastic measures are clearly needed if EEOC is ever to become an agency which effectively combats employment discrimination..." United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1977, To Eliminate Employment Discrimination - A Sequel (1977), p. 177. See also United States Commission on Civil Rights, The Challenge Ahead, Equal Opportunity in Referral Unions (May 1976).

IMAGE was created because of the substantial underrepresentation of Hispanics in federal, state, and local employment. For example, although Hispanic Americans comprise over 7% of the national population, they hold only 3.5% of the 2.4 million federal jobs, 2.4% of the 1.5 million state jobs, and 4.1% of the 2.5 million local/municipal jobs.

The League of United Latin American Citizens (LULAC) is a national civil rights organization with social and cultural functions. Its 50th anniversary year, 1978, was spent continuing the development of an equitable share of job opportunities for Hispanics. LULAC has been responsible for the formation of Operation SER, the largest Hispanic training program in the country.

SER-Jobs for Progress, Inc., (SER), is a nonprofit Texas corporation which has been

providing employment and training services to economically disadvantaged Hispanics throughout the United States for the past decade. National SER is providing $2.7 million in training and technical assistance to some sixty local SER/CETA program service deliverers. There are several local SER program operators that provide employment and training services to economically disadvantaged unemployed residents.

QUESTIONS PRESENTED

1. May a Private Employer and a Labor Organization Voluntarily Take Affirmative Action to Bring Minorities Into a Workforce From Which They Are Absent?

2. Does the Trial Record Provide a Reasonable Basis for the Affirmative Action Plan?

3. Should the Case be Remanded for Further Development of the Record on the Issue

of Prior Discrimination?

STATEMENT OF THE CASE

Amici defer to Petitioners to describe the factual setting of this case with the exception of the substantial evidence of prior discrimination which was not developed by any party, as set forth in Section I.

ARGUMENT

Amici curiae respectfully urge that the decision below be reversed or remanded. A reasonable reading of Executive Order 11246 and Title VII,[2] the legislative and administrative history, and the relevant case law fully support the legality of the affirmative action plan. Furthermore, the reasonableness of the

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[2] 42 U.S.C. §2000(e)(2) et seq.

plan is abundantly supported by the factual circumstances from which it arose.

The first question presented in this case is whether a private employer and labor organization may voluntarily undertake affirmative action to bring minorities into a workforce from which they are absent. Amici disagree with the trial court, the Fifth Circuit Court of Appeals and Respondents herein. They assert that a permissible affirmative action plan would have aided only identifiable victims of discrimination and would be justified only upon a showing of prior discrimination by Kaiser's Gramercy plant. Furthermore, they contendthat race conscious affirmative action plans can be instituted only by the courts or the Executive Branch, and never by a private employer. Such restrictions are inconsistent with the provisions and purposes of Executive Order 11246 and Title VII.

The second question presented herein is whether the trial record contains sufficient

facts to support the legality of the affirmative action plan. Amici contend that the record contains sufficient facts upon which the necessity and reasonableness of the plan can be based. A judicial finding to this effect should have been made.

The third question is whether in the absence of a reversal the case should be remanded for further development of the record on the issue of prior discrimination. The trial court could invite the government and/or appropriate private parties with an interest in fully exploring this issue to intervene in the trial or it could appoint a master and/or employ an independent expert to investigate and report on the issue of prior discrimination.

I. THE PROPER STANDARD FOR DETERMINING THE VALIDITY OF A VOLUNTARY AFFIRMATIVE ACTION PLAN UNDER TITLE VII OR

EXECUTIVE ORDER 11246 IS WHETHER THE PLAN "REPRESENTS THE ONLY RATIONAL, NONARBITRARY MEANS OF ERADICATING PAST EVILS".

In NAACP v. Allen, 493 F.2d 614 (1974), the Fifth Circuit Court of Appeals observed,

> "It is the collective interest, governmental as well as social, in effectively ending unconstitutional racial discrimination, that justifies temporary, carefully circumscribed resort to racial criteria, whenever the chancellor determines that it represents the only rational, nonarbitrary means of eradicating past evils." 493 F.2d at 619.

The "past evils" in the present case are apparent from the record itself. In addition to the statistics at the Gramercy plant and its history of unfavorable Office of Federal Contract Compliance Programs (OFCCP) reviews,[3]

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[3]Trial Transcript, pp. 77, 85.

the testimony of Kaiser's Director of Equal Opportunity Affairs, Thomas M. Bouble, attests to the nation's legacy of unconstitutional racial discrimination:

> "I don't think there is any employer in the United States prior to a given time in our history, that didn't practice employment discrimination in some form." Trial Transcript, p. 125.

Mr. Bouble also expressed his opinion why minorities historically have suffered exclusion from the skilled trades:

> "My personal opinion is, it's a direct result of employment discrimination over the years, the lack of opportunity on the part of the blacks in some areas of the community, Mexican-Americans certainly, women, to obtain the kind of training that was necessary to achieve the skills." Trial Transcript, p. 98.

The necessity of the affirmative action plan, and its reasonableness, also can be inferred from the testimony of Dennis E. English, Kaiser's Industrial Relations Superintendent. When asked if he knew of any other means

available, Mr. English replied, "I don't." Trial Transcript, p. 60.

The reasonableness of the plan is further evidenced by the fact that it increases, rather than decreases, all Kaiser employees' rights, and the duration of the plan is limited to three years (the length of the collective bargaining agreement) or the achievement of approximately proportional representation of qualified minorities in the craft trades. Trial Transcript, pp. 52, 64. Striking down the plan would lead to the absurd result of perpetuating a nearly 100% white craft department at the Gramercy plant in the name of equal opportunity.[4]

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[4] It was stipulated at trial that a strict seniority system for selection of craft trainees would have resulted in the selection of 100% whites, rather than 4 whites and 5 blacks, in the first 9 positions filled under the affirmative action plan. All of the first thirteen openings except one would have been filled by whites if strict seniority were followed. Trial Stipulation (Joint
(cont. next page)

Amici submit, on the basis of more than 100 years of combined organizational experience in the struggle to defend equal opportunities for hispanics, that affirmative action plans such as that in contoversy here are the only rational, nonarbitrary means of eradicating past discrimination for millions of minorities and women across the nation.

The Court today is called upon to apply to the arena of employment relations the same principles which it has applied in other areas of national concern. It has been widely recognized that the "Constitution is both color blind

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4 (con't. from last page)
ExhibitA), Trial Transcript, pp. 197-198. Furthermore, the importance of each trainee slot to the affirmative action program is emphasized by the fact that these slots are created based upon the company's needs: "What we attempt to do is forecast the positive needs that we think we're going to have...I don't think, personally, that we're going to be looking at a group of trainees, at any time in the near future, of more than 20 trainees at once. We don't have any trainees for 1975." Trial
(cont. next page)

and color conscious." United States v. Jefferson County School Board, 372 F.2d 836, 876 (5th Cir. 1966), aff'd on rehearing en banc, 380 F.2d 385, cert. denied sub nom. Caddo, Parish School Board v. United States, 389 U.S. 840 (1967). It is the color conscious aspect of the Constitution which permits the courts to approve voluntary affirmative action plans under appropriate circumstances. Federal Courts of Appeals repeatedly have upheld race conscious remedies. Morrow v. Dillard, 18 FEP Cases 119 (5th Cir. 1978); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); EEOC v. AT&T, 419 F. Supp. 1022 (E.D. Pa. 1976), aff'd 556 F.2d 167 (3rd Cir. 1977), cert. denied, 98 S.Ct. 3145 (1978). Title VII and Executive Order 11246

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4 (cont. from last page) Transcript, pp. 63-64. As for the length of time needed to achieve the desired results of the affirmative action plan, witness English testified, "I'm guessing it could probably be a minimum of ten years, to a maximum of maybe never, depending upon our needs..." Trial Transcript, p. 64.

are even more explicity color conscious. 42 U.S.C. §2000(e)(2)(j); 41 C.F.R. §60 -1.40(a), 2.10-2.13.

On December 8, 1978, the Equal Employment Opportunity Commission (EEOC) voted to approve new Guidelines on Affirmative Action[5] which reaffirm the government's commitment to the type of affirmative action program under attack today and, Amici contend, implement the standard enunciated in NAACP v. Allen, supra. The EEOC approved the guidelines,

> "to prevent liability from claims of so-called 'reverse discrimination' and to promote voluntary action to increase employment opportunities for minorities and women without infringing on the rights of others." EEOC Press Release (December 11, 1978) p. 1.

Eleanor Holmes Norton, Chair of the EEOC, said upon releasing the guidelines that Regents of the University of California v. Bakke,

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[5] 29 C.F.R. §1608.1, et seq.

98 S.Ct. 2733 (1978) and Weber v. Kaiser Aluminum Corp., 563 F.2d 216 (5th Cir. 1977) demonstrate "the need for government guidance" and observed that,

> "It is fundamentally unfair to put an employer in a position where he is at risk if he tried to bring himself into compliance and at risk if he does not. Neither Congress nor the Courts could have intended so irrational a result." Press Statement, Eleanor Holmes Norton (December 11, 1978), p. 2.

Hence, the contention of Amici that Congress did not intend to invalidate voluntary programs such as the instant plan when it enacted Title VII, §§703(a), (d), (h) and (j) of the Equal Employment Opportunity Act.[6] Moreover, it should be recalled that the guidelines do not contain new or novel legal notions, but rather were written to clarify these issues so as "to eliminate confusion and encourage voluntary action and compliance that the statute envisions."

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[6] 42 U.S.C. §§ 2000(e)(2)(a), (d), (h) and (j).

Press Statement, supra, p. 1. Thus, it is appropriate for the court to hold that the guidelines issued on December 11, 1978 should, in fact, be the standard applied to determine the validity of the affirmative action plan in controversy. Amici respectfully submit that the case should be remanded to the District Court to give appellants an opportunity to comply with the formal requirements of the guidelines so that the Court can then determine if the affirmative action plan is protected under §713 (b)(1)[7] and 29 C.F.R. §1610(b).

While it is true that the new guidelines postdate the 1974 Labor Agreement, this Court has previously given similar consideration to revised EEOC guidelines and has consistently held that "the administrative interpretation of the Act by the enforcing agency is entitled to great deference." Griggs v. Duke Power Co.,

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[7] 42 U.S.C. §2000 (e)(12)(b)

401 U.S. 424, 433-434 (1971).[8] Also, the basic judicial duty to avoid constitutional decision is well established. Rescue Army v. Municipal Court, 331 U.S. 549, 572, n. 38 (1947); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936). A remand also would permit the District Court to hear additional evidence on the assessment by OFCCP of Kaiser's employment practices regarding prior discrimination and the need for the present plan in order to comply with OFCCP standards. Under the guidelines, the EEOC recognizes,

> "...that affirmative action by government contractors may be lawful under Title VII for either of two distinct reasons: (a) such efforts constitute reasonable action to implement the legislative purposes of Title VII, or (b) the action was taken pursuant to, and in conformity

[8] Griggs concerned job requirements initiated by Duke Power Company between 1955 and 1965, whereas the EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. §1607, considered by the court in Griggs were revised on August 1, 1970, seven months prior to the court's decision on March 8, 1971.

> with Executive Order No. 11246." EEOC, Supplementary Information: An Overview of the Guidelines on Affirmative Action (December 8, 1978), p. 10.

A. A VOLUNTARY AFFIRMATIVE ACTION PLAN'S REMEDIAL PREFERENCE TO UNIDENTIFIED MINORITIES DOES NOT INVALIDATE THE PLAN.

The decision below cites Franks v. Bowman Transportation Co., 424 U.S. 747, 781 (1976) (Burger, C.J. dissenting) for the proposition that the affirmative action plan "robs Peter to pay Paul." This reliance is misplaced in that Franks concerned a lawsuit brought by specific individuals and a defined class of individuals alleging discrimination against them during a specified period of time. The present case does not involve a lawsuit attempting to recapture wrongfully denied seniority rights. Rather, the controversy

involves the specific means by which minorities grossly underrepresented in the company's craft positions, are to be given the opportunity to fill craft positions on an equal footing with whites. The specific issue is one of first impression for this Court. Weber, supra, at 230 (Wisdom, dissenting).

The concept and purposes of seniority systems have been considered recently on several occasions by this and other courts. Franks, supra; United Air Lines v. Evans, 431 U.S. 553 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The Ninth Circuit Court of Appeals in recent weeks had occasion to distinguish between a seniority system and a provision which was "not part of a seniority system." Bryant v. California Brewers, 595 F.2d 426 (1978). Amici contend that the affirmative action plan is not part of a seniority system and should not be measured by the standards applicable to

seniority systems cases. Indeed, Mr. Weber does not contend that the relevant section of Title VII controlling seniority systems, §703 (h),[9] was violated by the affirmative action plan.

Furthermore, no reasonable expectations of white employees were disturbed by the affirmative action plan. Prior to the 1974 Labor Agreement, substantially all maintenance and craft personnel employed at Kaiser's Gramercy plant were obtained by the hire of persons qualified and trained in such crafts prior to employment at Kaiser. Trial Transcript, p. 196[10]

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[9] 42 U.S.C. §2000(e)(2)(h)

[10] The devastating effect of this requirement on minorities is reflected by the fact that until the implementation of the 1974 Labor Agreement, approximately 98% of all craft employees were white, as compared with a labor force which was 39% black and a community that was 46% black. Trial Transcript pp. 50, 54.

This excluded the majority of Kaiser's work force, including persons such as Mr. Weber with relatively little experience and training. Thus, the implementation of the new selection procedures expanded, rather than restricted, the employment opportunities of white, minority and women employees.[11] Indeed, a training program exclusively for blacks was held by the Fifth Circuit of Appeals to be proper where they had been disproportionately excluded from craft positions in the past:

> "Of the more than three hundred craft positions, only three are filled by black employees - and these are recent enrollees in the four-year apprenticeship program. The implications under Title VII are obvious. United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971)." Buckner v. Goodyear Tire and Rubber Co., 339 F. Supp. 1108, 1122 (N.D. Ala. 1972), aff'd without opinion, 476 F.2d 1287 (5th Cir. 1973).

The remedy ordered by the Fifth Circuit Court

[11] Trial Transcript, pp. 60-62

of Appeals in Buckner included the following:

> "The company is to provide, at its cost, pre-apprenticeship academic training for 20 black applicants each year through a selected course of study conducted at a local educational institution and directly related to the entrance requirement of its apprenticeship program...Selection of participants will be done by Goodyear after direct contact with appropriate leaders of the black community, provided however preference shall be given to blacks presently employed by Goodyear." 339 F. Supp. at 1124-1125.

Thus, no requirement was imposed that the beneficiaries of the court-ordered relief be "identifiable" victims of discrimination as the court below would require.

The Buckner relief also included a one-to-one ration for blacks and whites admitted to Goodyear's Apprenticeship Program

> "until such time that the percentage of blacks in the craft jobs (including the apprenticeship program) is at least three-fourths of the percentage of blacks in the production jobs...[12]

[12] Buckner, supra, at 1125. The trial court (cont. next page)

Unlike Regents of the University of California v. Bakke, supra, the present case does not involve preferences awarded to minorities "less qualified" than whites for the positions in question. Trial Transcript, pp. 39-40. Also, the craft training program at issue does not exclude whites. On the contrary, it creates craft opportunities for both white and minority Kaiser employees which they did not have before. The Bakke court, in applying the compelling state interest test to determine if Mr. Bakke's Fourteenth Amendment rights had been violated, noted that "The employment discrimination cases also do not advance petitioner's cause." 1198 S.Ct. at 2754.

B. THE FAILURE OF BOTH THE COMPANY AND THE UNION TO ADMIT OR ESTABLISH PRIOR DISCRIMINATION ON THEIR PART DOES NOT INVALIDATE THE PLAN.

In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court called upon employers

> "...to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in his country's history. 422 U.S. at 418.

See also Griggs, supra, at 432. Clearly, it was the intention of Congress in enacting Title VII to relieve the country of this historical burden as quickly as possible, and not to rely exclusively upon court actions. The desperate cry of the sixties for equal opportunity could not be harmonized with the cautious wheels of courtroom justice. Thus, the permissive language of §703(j):[13] "...nothing contained in this subchapter shall be interpreted to require any employer...to grant

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[13] 42 U.S.C. §2000(e)(2)(j)

preferential treatment..." (emphasis added) The new guidelines implement this permissive standard, allowing employers to exercise their own discretion regarding the need for an affirmative action program. And there is no requirement that the employer admit or establish a violation of Title VII as a prerequisite to implementing an affirmative action plan:

> "It is not necessary that the self-analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exist arguable defenses to a Title VII action." 29 C.F.R. §1608(b).

C. EVIDENCE OF DISCRIMINATION BY PERSONS OR INSTITUTIONS OTHER THAN THE EMPLOYER IS RELEVANT TO DETERMINE THE PROPRIETY OF A RACE CONSCIOUS AFFIRMATIVE ACTION PLAN.

The broad purpose of Congress in the enactment of Title VII is plain from the language of the statute: to achieve equality of employment opportunities and remove barriers that have operated in the past to favor white employees over other employees. Griggs, supra, at 429-420. The thrust of the Act is the consequences of past discrimination, not the particular offending party or his motivation. Griggs, supra, at 432. Amici contend that the complex and continuing history of racial discrimination in this country[14] defies simple distinctions between societal and individual discrimination. This was recognized by the EEOC in its refusal to rigidly define a method of self-analysis for employers: "There is no mandatory method of conducting a self-analysis." 29 C.F.R. §1608.4(a). More specifically, the guidelines advise employers to be concerned,

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[14] see n. 1, supra.

> "...with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions." 29 C.F.R. §1608.4(a).

Amici submit that this language, the court decisions cited herein, the new guidelines and common sense lead to the inescapable conclusion that the societal versus individual discrimination dichotomy should no longer have a place in the enforcement of our equal employment laws. It is unrealistic to exclude evidence of discrimination by persons or institutions other than the employer in assessing the validity of a race conscious voluntary affirmative action plan. Weber, supra, at 235 (Wisdom, dissenting). In addition, as explained in amici's brief requesting a writ of certiorari herein, the Thirteenth Amendment is aimed at the abolition of all "badges and incidents" of slavery, including the concept of white supremacy, and does not make a distinction between societal and individual

discrimination. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 442-443 (1968); Runyon v. McCrary, 427 U.S. 160 (1976). See generally Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L. Rev. 387 (1967).

II. THE TRIAL RECORD PROVIDES A REASONABLE BASIS FOR THE AFFIRMATIVE ACTION PLAN.

While amici contend that prior discrimination by the employer is not a requirement for race conscious voluntary affirmative action, evidence of prior discrimination is relevant in evaluating the reasonableness of the affirmative action program actually implemented. Amici submit that the Gramercy plan was lawful and reasonable based upon the history of exclusion of minorities and women from craft positions, the failure on the part of the employer and union to validate the experience

requirements which adversely affected minorities and women, the absence of invidious or stigmatizing discrimination against whites as a result of the plan, and the reasonableness of the terms of the plan, as discussed above.[15] The trial court's failure to take cognizance of the substantial evidence of prior discrimination at the Gramercy plant proved to be a fatal flaw in reaching a proper conclusion either under the Respondents' standard, requiring such prior discrimination, or Petitioners' standard, which would consider prior discrimination by the

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[15] In addition to the company's reasonable creation of craft employment opportunities for minorities and women, the union has a duty to represent all employees in a bargaining unit without discrimination. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). Here, the employer and the United Steelworkers union had a mutual interest to be served by the affirmative action plan. The plan "strikes a balance in apportioning future expectations among innocent and competing parties..." U.S. v. Lee Way Motor Freight, Inc., 15 FEP Cases 1385, 1404 (W.D. Okla. 1977).

employer as one factor in assessing the reasonableness of the affirmative action plan. Even without OFFCCP records, there was substantial uncontroverted testimony at trial revealing noncompliance with OFCCP standards.[16] In light of this evidence, the burden shifted to plaintiff to show the absence of prior discrimination. Weber, supra, at 236 (Wisdom dissenting).

As for prior discrimination by Gramercy against minorities in violation of Title VII, the uncontroverted statistical evidence discussed above points inescapably to at least a prima facie case of discrimination which was never rebutted. Weber, supra, at 231 (Wisdom,

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[16] According to witness English, implementation of the plan was a "do it or else" matter, and he noted the 1969 OFCCP compliance review after which a 50/50 hiring ratio was recommended until the "in-plant population equaled the general population in the community." Trial Transcript, pp. 77, 85. At the time of the 1974 Labor Agreement, minorities held 14.8% of all jobs at Gramercy, whereas they constituted 39% of the area's labor force. Trial Transcript, pp. 50-51.

dissenting); IBT, supra; Green v. McDonnell Douglas Corp., 411 U.S. 792 (1973).

In the face of the above described trial record, the trial court found,

> "...no evidence that Kaiser, in incorporating this quota system in the 1974 Labor Agreement, did so with a view toward correcting the effects of prior discrimination at any of the fifteen plants to which the system had application." Opinion of Gordon J., District Judge, Trial Transcript, p. 210.

III. IN THE ALTERNATIVE, THIS CASE SHOULD BE REMANDED TO PROVIDE A COMPLETE RECORD TO DETERMINE THE VALIDITY OF THE AFFIRMATIVE ACTION PLAN.

Amici contend that no party at trial had an interest in proving prior discrimination. Weber, supra, at 231 (Wisdom, dissenting). Amici do not contend that the trial herein was collusive. Nevertheless, the same effect is produced where all parties have a similar interest in not fully exploring evidence regarding an important issue in the lawsuit, here

evidence of prior discrimination by the Gramercy plant. Mr. Weber, of course, would not produce such evidence. Clear evidence of past discrimination by Gramercy would tend to weaken his case by further justifying the affirmative action plan. Neither the employer nor the union would volunteer such evidence, obviously in order to avoid claims by minorities and women for relief under Title VII and 42 U.S.C. § 1981. U.S. v. Johnson, 319 U.S. 302 (1943) describes the public policy which was left unprotected in this lawsuit, just as occurred in Regents of the University of California v. Bakke, supra, where the absence of minority participants at trial contributed to an incomplete record on the issue of past discrimination at the University of California. In Johnson the Court noted the "absence of a genuine adversary issue between the parties" and warned that the trial court under such circumstances,

> "may not safely proceed to judgement, especially when it assumes the grave responsibility of passing upon the constitutional validity of legislative action." 319 U.S. at 304.

Amici contend that the trial court could have insured the integrity of the judicial process under these circumstances either by inviting the government and/or appropriate private parties with an interest in fully exploring this issue to intervene in the trial, or by appointing a master[17] and/or independent expert to investigate and report on the issue of prior discrimination.[18]

CONCLUSION

The proper standard to determine the validity of the affirmative action plan is set

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[17] Fed. Rules Civ. Proc. Rule 53; Hackley v. Roudebush, 520 F.2d 108, 153 (1975).

[18] Fed. Rules Evidence Rule 706.

forth in the EEOC's Guidelines on Affirmative Action. These guidelines implement and refine the reasonableness test which would uphold any affirmative action plan that represents the "only rational, nonarbitrary means of eradicating past evils." The cases cited herein, along with the EEOC's analysis of the issues confronted in the guidelines, show the errors inherent in the standards applied by the Fifth Circuit Court of Appeals. Furthermore, the trial record contains sufficient facts to support both the necessity and reasonableness of the affirmative action plan. The case, therefore, should be reversed or remanded to permit Petitioners to comply with the formal requirements of the Guidelines on Affirmative Action. Regardless of whether the Court finds the EEOC's new guidelines applicable, the case should be remanded for further development of the record on the issue of prior discrimination Specifically, if there is no judicial finding of

prior discrimination, the trial court should either invite the government and/or private parties to intervene, or appoint a master and/or independent expert in order to fully develop the record on the question of prior discrimination.

Respectfully submitted,

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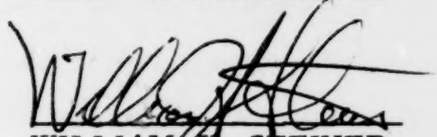

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APPENDIX A

APPENDIX A

STATEMENT OF PRINCIPLES

1. This country cannot attain true equality of opportunity without affirmative action.

2. Title VII and the anti-discrimination principle must be understood in the context of our nation's history of discrimination against non-white people and women and its resulting national patterns of underrepresentation and inequality in the workforce.

3. As explained by the EEOC in its "Guidelines on Affirmative Action", which as a result of Executive Order 12067 state the position of the Executive Branch: "Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the workplace...Voluntary Affirmative Action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII."

4. Title VII and the anti-discrimination principle should not exclusively be a search for villains and villainous acts; on the contrary, the focus should be on current unequal conditions and providing mechanisms for their elimination.

5. The remedies for discrimination against minorities and discrimination against women are inextricably linked.

6. Voluntary action on the part of employers and unions is instrumental in redressing pervasive patterns of discrimination addressed by Title VII and Executive Order 11246. But this objective cannot be achieved if employers and unions must first expose themselves to charges that they are violating the very laws they are seeking to implement.

7. Long experience shows that in many instances "appropriate employment tools which recognize the race, sex or national origin of applicants and employees" (EEOC Affirmative Action Guidelines) such as those at issue in this case are presently the only effective means by which true equal opportunity can be achieved.

8. Endorsement of voluntary affirmative action in no way diminishes the need for judicially mandated or administratively required affirmative measures which provide the necessary incentive for voluntary action.

The above statement has been endorsed by numerous organizations and labor unions, including, among others, District 1199, National Union of Hospital and Health Care Employees, AFL-CIO, United Electrical, Radio and Machine Workers of America and the Affirmative Action Coordinating Center (AACC). AACC is an organization created by the National Conference of Black Lawyers, (NCBL), the Center for Constitutional Rights, (CCR) and the National Lawyers Guild (NLG) with participation by a cooperating network of civil rights, civil liberties, and other organizations.